BOND HOLDINGS SDN BHD v. SYCAL BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMONS NO: WA-22NCvC-590-10-2022]
5 JUNE 2024

Abstract – *Where a party has been unjustly enriched at the expense of another without a legal basis for retaining such enrichment, the enriched party can be compelled to make restitution.*

CONTRACT: *Agreement – Breach – Collaboration agreement to raise advance funding to complete commercial suits in development project – Share of net sales proceeds from sales of commercial suites – Failure of claimant to raise full agreed sum – Whether claimant entitled to receive share of net sales proceeds based on sum of advance funding actually raised – Whether parties by agreement and/or conduct agreed not to strictly adhere to terms of collaboration agreement – Whether there was breach of collaboration agreement by claimant – Whether termination of collaboration agreement valid*

CONTRACT: *Unjust enrichment – Agreement – Collaboration agreement to raise advance funding to complete counterclaimant's commercial suits in development project – Claimant entitled to share of net sales proceeds from sales of commercial suites under collaboration agreement – Failure to raise full agreed sum – Amount of advance funding raised and provided by claimant – Whether claimant entitled to receive share of net sales proceeds based on sum of advance funding actually raised – Whether counterclaimant enriched – Whether counterclaimant's enrichment gained at claimant's expense – Whether there were defences to extinguish or reduce counterclaimant's liability*

The present case arose out of a contractual dispute between the parties. The plaintiff ('Bond') and the defendants ('Sycal') were companies. The first defendant was the owner and the second defendant was the developer of Laman Bougainvillea Ipoh. The project comprised, amongst others, commercial suits which consisted of approximately 257 units of service suites/residences. The commercial suites were still under construction with the completion percentage at approximately 80% with only 72 units out of 257 units sold. Due to the COVID-19 pandemic and the political uncertainty of the times, there was a softening of the property market resulting in a drop in the sales. Consequently, the project cash flow suffered and Sycal were having financial difficulties in completing the remaining 20% of the construction of the commercial suites. To raise funds to complete the construction as well as to help sell the remaining 185 units of the commercial suites, Sycal sought the expertise and help of Bond. Bond and Sycal thus entered into a collaboration agreement which provided that: (i) RM20 million was required to complete the remaining 20% of the construction of

A the commercial suites; and (ii) Bond agreed to raise an advance funding of RM20 million for Sycal to complete the commercial suites and Bond in return would receive a share of the net sales proceeds from the sales of the commercial suites. However, the construction of the commercial suites could not progress smoothly because of the movement control orders imposed by
B the Government of Malaysia. There were also delays in the construction of the commercial suites. Disputes arose when Bond issued a letter to Sycal requesting Sycal to provide particulars of the utilisation of the 'advance funding' by Sycal towards the completion of the remaining 20% of the commercial suites. Sycal in response terminated the collaboration
C agreement, alleging that Bond failed to pay RM35,910,700 being the advance funding requirement required under the collaboration agreement. Bond filed the present suit against Sycal while Sycal counterclaimed. The issues that arose were: (i) did the parties by agreement and/or conduct agreed not to strictly adhere to the terms of the collaboration agreement; (ii) whether there
D was a breach of the collaboration agreement by Bond; (iii) was the termination of the collaboration agreement by Sycal valid; (iv) was Bond entitled to damages of RM8,645,048.71 or in the alternative, a sum to be assessed by the court; and (v) whether Sycal was entitled to the reliefs sought in the counterclaim.

E **Held (allowing claim in part; allowing counterclaim in part):**

(1) Sycal's company secretary and financial controller admitted that there was no strict adherence to the timeline provided in the agreement based on the letters from Sycal to Bond. However, Sycal's letter dated 27 January 2022 in fact showed Sycal reminded Bond that Bond failed
F to pay the fourth tranche payment, the fifth tranche payment was deferred to 23 April 2022, the sixth tranche payment was deferred to 24 June 2022 and the final payment was deferred to 22 October 2022. The letter dated 9 March 2022 also showed Sycal reminded Bond to pay in accordance with the new deadlines. Although Sycal did give some
G extensions to the payment deadlines, Bond was still under an obligation to comply with the new deadlines stipulated by Sycal. Thus, Bond failed to prove that the parties by agreement and/or conduct agreed not to strictly adhere to the terms of the collaboration agreement. (paras 51-54)

(2) Bond failed to adduce any evidence to show that it had complied with
H the new payment deadlines stipulated by Sycal. Nowhere in Bond's written submission could be seen any assertion and proof to show Bond had raised the full agreed RM20 million in advance funding in accordance with the new deadlines. In fact, Bond in its written submissions at para. 70 admitted that 'Sycal received a sum of
I RM18,816,000 out of the RM20,000,000 that Bond was to raise for Sycal under the agreement. As such, Bond fulfilled 94.08% of its obligation under the agreement'. Bond had breached its obligation to

raise RM20 million in advance funding under the collaboration agreement. The termination of the collaboration agreement by Sycal was valid. (paras 57-60)

(3) In view of Sycal's admission that it had received a sum of RM18,816,000 from Bond and Bond's reliance on this admission in its written submissions, Bond had raised a sum of RM18,816,000. RM18,816,000 out of RM20 million was 94.08%. Therefore, Bond had fulfilled 94.08% of its obligation to raise RM20 million under the collaboration agreement. Sycal had enjoyed the benefit of this RM18,816,000 to use for its construction of the remaining 20% of the commercial suites. Further, since the sales of the 74 units of commercial suites since the collaboration agreement, Sycal had continued to receive its entitlement under the formula set out in cl. 2.7 of the collaboration agreement. Sycal had indeed been enriched by Bond. The enrichment was at Bond's expense as Bond used its own funds and monies to carry out the marketing and sales of the remaining 185 commercial units that were not sold. It was unjust for Sycal to keep RM2,583,824.21 since it was earned by Bond from its fulfilment of 94.08% of its obligation to raise RM20 million under the collaboration agreement. The facts did not show any defences to extinguish or reduce Sycal's liability to make restitution to the claim. Bond had made out a cause of action in unjust enrichment against Sycal. Sycal was liable to pay to Bond RM2,583,824.21 under the principle of unjust enrichment. (paras 94, 95, 99, 101, 125 & 126)

Case(s) referred to:

Barton v. Morris And Another (In Place Of Gywn Jones, Decd) [2023] AC 684 ***(refd)***

Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd & Anor [2020] CLJU 442; [2020] 1 LNS 442 HC ***(refd)***

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***

Contra Holdings Ltd v. Bamford [2023] EWCA Civ 374 ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

KS Lee Energy LLP v. Toyo Ink Group Bhd [2023] CLJU 1978; [2023] 1 LNS 1978 HC ***(refd)***

Lumbers & Anor v. W Cook Builders Pty Ltd (In Liq) 247 ALR 412 ***(refd)***

Pavey & Matthews Pty Ltd v. Paul (1987) 69 ALR 577 ***(refd)***

Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd [2016] 10 CLJ 112 CA ***(refd)***

Selvaduray v. Chinniah [1939] CLJU 107; [1939] 1 LNS 107 SC ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] CLJU 161; [1967] 1 LNS 161 ***(refd)***

Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

U Television Sdn Bhd & Anor v. Comintel Sdn Bhd [2017] 10 CLJ 580 FC ***(refd)***

Usima Sdn Bhd v. Lee Hor Fong [2017] 9 CLJ 646 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 71
Evidence Act 1950, ss. 101, 102, 103

For the plaintiff - Ivanpal Singh Grewal & Pang Li Wei; M/s AJ Ariffin Yeo & Harpal
For the defendants - Christopher Ik Chu Jek & Siti Hajar Aziz; M/s Jim Neoh & Ik

Reported by Lina E

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] This is a trial heard over seven days on 9 October 2023, 10 October 2023, 11 October 2023, 12 October 2023, 30 October 2023, 6 December 2023 and 3 January 2024. Oral submissions by counsel were held before me on 4 April 2024 and 24 May 2024. At the conclusion of oral submissions on 24 May 2024, I delivered my decision. These are my grounds of judgment.

[2] The trial arose out of a contractual dispute between the plaintiff ("Bond") and the two defendants (collectively "Sycal") arising out of a collaboration agreement dated 29 December 2020 ("collaboration agreement") whereby Bond agreed to raise an advance funding of RM20 million for Sycal to complete the commercial suites of a development project known as Laman Bougainvillea Ipoh ("commercial suites"). In return, Bond receives a share of the net sales proceeds from the sales of the commercial suites. ("net sales proceeds").

[3] The collaboration agreement dated 29 December 2020 can be seen in encl. 50 bundle B15 from pp. 3538 to 3719.

[4] Essentially, the disputes arose due to the failure of Bond to raise the full agreed RM20 million and whether Bond is entitled to receive a share of the net sales proceeds based on the advance funding of RM18,816,000 actually raised by Bond. The sum of RM18,816,000 is admitted in the defence. (See encl. 33 bundle A defence on p. 56 at para. 33).

[5] A further issue is if Bond is entitled to receive a share of the net sales proceeds how much is Bond entitled to receive after deducting what Bond had earlier received?

[6] Sycal has filed an amended defence and counterclaim.

Background Facts

[7] The plaintiff is a company incorporated in Malaysia with a registered address in Ipoh, Perak.

[8] The first defendant, Sycal Berhad, is a company incorporated in Malaysia with a registered address in Kuala Lumpur.

[9] The second defendant, Sycal ICC Properties Sdn Bhd, is a company incorporated in Malaysia with a registered address in Kuala Lumpur. A

[10] The first defendant is the owner, and the second defendant is the developer of Laman Bougainvillea Ipoh in the town of Ipoh. The project comprises, amongst others, the commercial suites comprising approximately 257 units of service suites/residences. B

[11] As of 29 December 2020, the commercial suites were still under construction with the completion percentage at approximately eighty per cent (80%) with only 72 units out of 257 units sold. Due to the COVID-19 pandemic, and the political uncertainty of the times, there was a softening of the property market resulting in a drop in the sales. Consequently, the project cash flow suffered and Sycal were having financial difficulties in completing the remaining 20% of the construction of the commercial suites. C

[12] Although the commercial suites were eighty per cent (80%) completed, only 72 units out of 257 units of the commercial suites were sold. To raise funds to complete the construction as well as to help sell the remaining 185 units of commercial suites, Sycal sought the expertise and help of Bond. (See encl. 50 bundle B15 the recital D to F of the collaboration agreement at p. 3541). D

[13] Bond and Sycal thus entered into the collaboration agreement as mentioned earlier. E

[14] Chin Kok Wah DW1 testified that pursuant to the collaboration agreement it was estimated that RM20 million was required to complete the remaining 20% of the construction of the commercial suites. (See encl. 72 witness statement of Chin Kok Wah at Q and A5). F

[15] The collaboration agreement is rather carelessly and poorly drafted. For example, Bond is wrongly stated as Bond Holdings Resources Sdn Bhd instead of Bond Holdings Sdn Bhd. The first page wrongly stated it's an agreement between Bond and the first defendant only. The agreement is actually between and signed by Bond and Sycal. (See encl. 50 bundle B15 at pp. 3538 to 3719 for the collaboration agreement). G

[16] The amount of "advance funding" under cl. 2.1 and Schedule 1 is not clear. (See encl. 50 bundle B15 at p. 3573 for Schedule 1).

[17] The material terms of the collaboration agreement are as follows: H

(i) Bond shall provide Sycal with advance funding for the completion of the remaining 20% of the of the construction of the commercial suites, which shall be released to Sycal's project account in the manner described under cl. 4 and Schedule 1 of the agreement; (See encl. 50 bundle B15 schedule 1 at p. 3573). Sycal in its amended counterclaim has admitted Bond agreed to provide advance funding of RM20 million. (See encl. 33 bundle A para. 78 (d) of the counterclaim at p. 70); I

(ii) Clauses 2.5 and 5.1(c) state that the 'advance funding' will only be used by Sycal to complete the remaining 20% of the commercial suites development, and Sycal shall obtain a certificate of completion and compliance ("CCC") for all the commercial units within one year from 29 December 2020 or such other extended time as may be mutually agreed between the parties in writing;

(iii) Clauses 2.6 and 6.1(a) state that in consideration for Bond granting the 'advance funding', Bond is entitled to assume the obligation and responsibility for the marketing and sales of the remaining 185 commercial suites that are still unsold;

(iv) Clause 2.7 states Sycal is entitled to a sum of RM330 per square feet for each remaining commercial suites sold ("Sycal's entitlement"), whereas the remaining amount in the selling price per square feet for each remaining commercial suites sold shall belong to Bond ("Bond's entitlement"). (See encl. 50 bundle B15 p. 3545);

(v) Clause 2.8 provides that the floor premium rate shall be set at RM1,000 only per floor and shall be split 50:50 between parties, and this will be deducted from the respective entitlements of each party;

(vi) Clause 6.1(e) states that Bond, in carrying out its marketing and sales responsibilities for the remaining 185 commercial units that have yet to be sold, will bear all the expenses and costs incurred for the marketing and sales purposes including promotion, advertising, hiring of agents and third parties; (See encl. 50 bundle B15 p. 3551);

(vii) Clause 5.1(I) states that Sycal shall give access to Bond to a vacant area on the ground floor of the commercial suites lobby to be used by Bond to carry out the marketing and sales of the remaining 185 commercial units that are unsold;

(viii) Clause 10.1 states that Sycal is to execute a corporate guarantee as a form of security and guarantee towards its performance of its obligations under the agreement;

(ix) Clause 10.3 states that if Sycal is unable to complete the construction of the commercial suites within the completion period (or any such extended dates as agreed to by parties), Bond may call on the corporate guarantee to cover its losses and/or to reimburse itself for expenses incurred;

(x) Clause 14.5 states that if Bond terminates the collaboration agreement, Bond has the right to continue with the construction/development of the commercial suites that Sycal has not completed; and

(xi) Clause 14.6 states that although Bond is entitled under cl. 14.5 to continue with the construction/development of the commercial suites, which has not yet been completed, Sycal shall remain as the developer of the commercial suites and all liabilities of the commercial suites shall remain with Sycal.

[18] However, the construction of the commercial suites could not progress smoothly because of the movement control orders imposed by the Government of Malaysia to combat the spread of COVID-19 pandemic. There were also delays in the construction of the commercial suites.

[19] Disputes arose between parties when Bond issued a letter to Sycal dated 12 September 2022 requesting Sycal to provide particulars of the utilisation of "advance funding" by Sycal towards the completion of the remaining 20% of the commercial suites. (See encl. 53 bundle B18 at pp. 4125 to 4126).

[20] Sycal in response issued a letter dated 14 September 2022 terminating the collaboration agreement alleging Bond failed to pay RM35,910,700 being the advance funding requirement required under the collaboration agreement. (See encl. 53 bundle B18 at pp. 4127 to 4134).

[21] For reasons which I will set out below, the allegation by Sycal that Bond failed to pay RM35,910,700 being the advance funding requirement is not supported by the evidence as the agreed sum to be advanced is in fact RM20 million.

[22] PW2 Hew Lee Kuen testified that Bond managed to sell 74 units of the commercial suites prior to the termination. (See encl. 69 of the plaintiff's witness statement of Hew Lee Kuen Q and A3).

[23] Bond filed this present suit against Sycal. Sycal filed a defence and a counterclaim.

Court Pleadings

The Pleaded Case Of The Plaintiff

[24] The reliefs claimed by Bond can be seen in the statement of claim (see encl. 33 bundle A). However, from the written submissions dated 1 March 2024 (encl. 98) filed by Bond it is clear that the claim by Bond is now confined to prayer 68(f) which is for a monetary sum of RM2,583,824.21 with interests and costs. This is clear from para. 72 of the written submissions which reads:

> However, applying the principle of *quantum meruit*, Bond ought to be entitled to 94.08% of RM9,946,389.46, namely RM9,357,563.20. So, deducting the amount already received by Bond, it would leave a sum of RM2,583,824.21 that Sycal must pay to Bond.

[25] From the written submissions dated 1 March 2024 (encl. 98) filed by Bond it is clear that Bond is not asking for prayers 68(a) to (e), (g) and (h).

[26] During the course of trial, Bond has also informed the court on 9 October 2023 that it is dropping prayer 68(g).

The Pleaded Defence And Counterclaim Of Sycal

[27] Sycal in its amended defence and counterclaim denied the claim by Bond. (See encl. 33 bundle A pp. 40 to 72). Sycal in the counterclaim against Bond seek the following reliefs:

(i) a declaration that Bond had breached the collaboration agreement;

(ii) a declaration that Sycal is entitled to the marketing and sales rights of the remaining 112 units of unsold commercial suites;

(iii) Bond to surrender all books, records, documents and properties in their possession or control relating to the collaboration agreement and the business, financial, technology, trademark or affairs of said company to Bond in accordance to cl. 14.8 of the collaboration agreement;

(iv) Bond is to pay Sycal a sum of RM575,500 as the outstanding sum for the advance funding of RM20,000,000;

(v) Bond is to refund Bond's entitlement of RM6,130,000 received by Bond to Sycal;

(vi) Bond is to refund to Sycal the purchase price of RM307,066 for the sale of Unit 06-08 Type A, Commercial Suites to Eternity Excellence Sdn Bhd;

(vii) damages to be assessed by this Honourable Court;

(viii) Bond is to pay exemplary and aggravated damages to Sycal; and

(ix) interest and costs.

[28] During the course of trial Sycal has informed the court that it is dropping prayer 78(f) which is for Bond to refund to Sycal the purchase price of RM307,066 for the sale of Unit 06-08 Type A, Commercial Suites to Eternity Excellence Sdn Bhd.

The Trial Process

[29] Bond called three witnesses. They are:

(i) Adnan bin Zulkifli the COO of Bond, PW1;

(ii) Hew Lee Kuen the CFO of Bond, PW2; and

(iii) Ong Teng Boon the CEO of Bond, PW3.

[30] Sycal called five witnesses. They are:

(i) Chin Kok Wah a director of Sycal, DW1.

(ii) Khor Mui Ngee a director in Eternity Excellence Sdn Bhd, DW2.

(iii) Woo Kok Wah, DW3

(iv) Koh Kim Koon company secretary of Sycal, DW4.

(v) Dato' Seow Yong Chin the MD of the second defendant, DW5.

[31] Parties filed written submissions which I must say consists of many bare allegations without citations of documents substantiating the allegations.

The Issues To Be Tried Agreed By The Parties

[32] The issues to be tried agreed by the parties dated (encl. 78 bundle E) to be determined by this court are:

(i) did the parties by agreement and/or conduct agreed not to strictly adhere to the terms of the collaboration agreement?

(ii) whether there is a breach of the collaboration agreement by Bond?

(iii) was the termination of the collaboration agreement by Sycal valid?

(iv) is Bond entitled to damages of RM8,645,048.71, or in the alternative, a sum to be assessed by the Honourable Court?

(v) whether Sycal is entitled to the reliefs sought in the counterclaim?

[33] Before I consider the agreed issues, it is necessary for me to decide what was the quantum of advance funding agreed by parties.

What Was The Quantum Of Advance Funding Agreed By Parties?

[34] The collaboration agreement states that Bond shall provide Sycal with advance funding for the completion of the remaining 20% of the construction of the commercial suites, which shall be released to Sycal's project account in the manner described under cl. 4 and Schedule 1 of the agreement; (see encl. 50 bundle B15 Schedule 1 in B15 p. 3573).

[35] Unfortunately, the agreement failed to state expressly what was the quantum of advance funding agreed by parties.

[36] From a perusal of the evidence, I am of the view the quantum agreed upon was RM20 million. The evidence shows:

(i) Sycal in its amended counterclaim has admitted Bond agreed to provide advance funding of RM20 million. (See encl. 33 bundle A at para. 78(d) counterclaim in p. 70).

(ii) Ong Teng Boon the CEO of Bond, PW3 testified he and Dato' Seow of Sycal agreed RM20 million was needed to complete the remaining 20% of the construction of the commercial suites. (See WSPW3 Q and A7);

(iii) Chin Kok Wah a director of Sycal, DW1 testified that pursuant to the collaboration agreement it was estimated that RM20 million was needed to complete the remaining 20% of the construction of the commercial suites. (See WSDW1 Q and A5);

(iv) parties had agreed the remaining 20% of the construction of the commercial suites is to be completed within one year from the execution of the agreement. (See cls. 2.2 and 2.5 of the collaboration agreement).

(v) Schedule 1 of the collaboration agreement shows a total of RM20 million advance funding provided within 15 months from the execution of the agreement. (See encl. 50 bundle B15 p. 3573);

(vi) Sycal in its reply written submissions encl. 103 at para. 5 stated that Bond agreed to provide advance funding of RM20 million; and

(vii) the cross-examination of SP1/PW1 by CI who is the counsel for Sycal shows the agreement was to provide advance funding of RM20million.

Pages 12 To 13 Of Notes Of Proceedings

CI But you agree that the defendants are facing financial difficulties?

SP1 Yeah.

CI Do you agree that the purpose or the intention of party is for Bond, the plaintiff, to come in to assist to completion?

SP1 Yes.

CI And the assistance is in the form of financial assistance. Do you agree?

SP1 Yes.

CI And the financial assistance comes in the form of advance funding of 20 million. Do you agree?

SP1 Yes.

CI So, to rephrase, Bond is coming in with a funding of 20 million to assist the defendant in completing the construction of the commercial suite. Do you agree?

SP1 Yes.

CI Now, the way the funding to be paid is in accordance to Schedule 1 of the collaboration agreement. Do you agree?

SP1 Yes.

CI And in return for the assistance, Bond is granted sales and marketing rights of 185 units of the commercial suite at that time. Do you agree?

SP1 Yes. ...

CI So, to complete the remaining 20%, Bond is coming in with the fund of 20 million to complete it. Do you agree?

SP1 Yes. (emphasis added)

Agreed Issue 1 – Did The Parties By Agreement And/Or Conduct Agreed Not To Strictly Adhere To The Terms Of The Collaboration Agreement?

Bond's Contentions

[37] Bonds contends that the parties by agreement and/or conduct agreed not to strictly adhere to the terms of the collaboration agreement. There were meetings held between PW2 and DW5 whereby an understanding was reached that because of the COVID-19 pandemic, both parties accepted that there would be delay on parties' obligation and to adopt some flexibility. Bond relies on encl. 95 notes of proceedings at pp. 572 and 575.

[38] Sycal's Company Secretary and Financial Controller, DW4 also admitted that there was no strict adherence to the timeline provided in the agreement. (See encl. 95 notes of proceedings p. 401).

[39] A letter was also issued to Sycal confirming the understanding. The said letter informed that Bond was unable to proceed with its obligations under the agreement due to the enforcement of regulations pertaining to the COVID-19 pandemic. (See encl. 53 bundle B18 Bond's letter at pp. 4125 to 4126).

[40] Hence, it is unconscionable for Sycal to claimed that there ought to be strict adherence to the payment dates pursuant to Schedule 1 of the agreement.

Sycal's Contentions

[41] Sycal disagreed that the parties by agreement and/or conduct agreed not to strictly adhere to the terms of the collaboration agreement.

Court's Analysis

Sections 101 To 103 Of The Evidence Act 1950

[42] The law on the burden of proof in Malaysia is governed by ss. 101 to 103 of the Evidence Act 1950.

> **Burden of proof**
>
> 101(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

On Whom Burden Of Proof Lies

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

ILLUSTRATIONS

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to his possession. Therefore, the burden of proof is on A.

(b) A sues B for money due on a Bond. The execution of the Bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed as the Bond is not disputed and the fraud is not proved. Therefore, the burden of proof is on B.

Burden of proof as to particular fact

103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

ILLUSTRATIONS

(a) A prosecutes B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[43] I need only refer to three decisions of our courts on the construction of ss. 101 and 102 of the Evidence Act.

[44] The Supreme Court in *Selvaduray v. Chinniah* [1939] CLJU 107; [1939] 1 LNS 107; [1939] MLJ 253 SC per Terrel Ag CJ said:

> The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the Plaintiff must establish his case. If he fails to do so it will not avail him to turn around and say that the Defendant has not established his. The Defendant can say 'it is wholly immaterial

whether I prove my case or not. You have not proved yours' (see the Judgment of the Privy Council in *Raja Chandranath Roy v. Ramjai Mazumdar* 6 Bengal Law Reports, page 303).

[45] The Federal Court in *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580 per Zulkefli Ahmad Makinudin PCA said:

35) On the meaning and application of the term "burden of proof" section 101 of the Evidence Act 1950 ["the Act"] states that it is the burden to establish a case which rests throughout on the party who assert the affirmative of the issue. The "burden of proof" in section 102 of the Act is the burden to adduce evidence, to make out or rebut the claim. The "burden of proof" in section 102 of the Act shifts from one side to the other according to the weight of the evidence.

[46] Because ss. 101 and 102 both use the phrase "burden of proof", some judgments in order to draw a distinction between ss. 101 and 102 call the burden in s. 101 as "burden of proof" and the burden in s. 102 as 'onus of proof'. (See *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580 FC per Zulkefli Ahmad Makinudin PCA at (36)).

[47] Besides being called 'onus of proof', the "burden of proof" in s. 102 is also called the "evidential burden". See *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357 per Gopal Sri Ram JCA.

[48] On 'onus of proof' this is what Zulkefli Ahmad Makinudin PCA said in *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580 which bears setting out *in extenso*:

[35] On the meaning and application of the term "burden of proof" s. 101 of the Evidence Act 1950 ("the Act") states that it is the burden to establish a case which rests throughout on the party who assert the affirmative of the issue. The "burden of proof" in s. 102 of the Act is the burden to adduce evidence, to make out or rebut the claim. The "burden of proof" in s. 102 of the Act shifts from one side to the other according to the weight of the evidence.

[36] In the Federal Court's case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 His Lordship Jeffrey Tan, FCJ cited with approval the principle laid down in the case of *Ranchhodbhai v. Babuhai* AIR 1982 Guj 308 as regards the "burden of proof" to establish a case which never shift and the shifting burden to adduce evidence in the context of ss. 101 and 102 of the Indian Evidence Act which are identical to ss. 101 and 102 of our Act as follows:

It is also well to bear in mind that there is an **essential distinction between 'burden of proof' and 'onus of proof';** burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process

A in the evaluation of evidence. (See *Raghavamma v. Chenchamma*, AIR 1964 SC 136). Burden of proof has two distinct meanings, namely, (i) the burden of proof as a matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence. Section 101 of the Evidence Act deals with the former and Section 102 of the Evidence Act with the latter. The first remains constant but the B second shifts. In a claim application, therefore, the burden of proof, in the first sense, certainly lies on the claimant. If he examines himself and his witness, if any, and if the evidence, tested in the light of the principle as set out above, is found to be acceptable, the onus shifts on the tortfeasor to prove those circumstances, if any, which dislodge the assertions of the claimants. If the tortfeasor fails C to prove before the Court any fact or circumstance which tends to affect the evidence led by the claimant, the claimant would be entitled to ask the Court to hold that he has established the case and, on that basis, to make a just award it would thus appear, that though the legal burden, – the burden as a matter of law and D pleadings – remains constant on the claimant, the burden as a matter of adducing evidence changes often times as the trial of the claim petition progresses.

(emphasis added)

[49] On "evidential burden" this is what Gopal Sri Ram JCA said in E *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357 at 367:

> The law on the burden of proof in this case is governed by ss. 101 and 102 of the Evidence Act 1950. In accordance with s. 101, the legal burden of establishing that there is money owing from the respondent to Chan lies on the appellant. However, in accordance with s. 102, *the evidential* F *burden* may move back and forth from the appellant to the respondent and *vice versa* in the course of the trial. On this point, we find it sufficient to quote from *Sarkar on Evidence*, 15th edn, vol. 2, p. 1452:
>
> > There is an essential distinction between the 'burden of proof' as a matter of law and pleading and as a matter of adducing evidence. G The burden in the first sense is always constant *but the burden in the sense of adducing evidence shifts from time to time having regard to the evidence adduced* or the presumption of fact or law raised in favour of one or the other (*Ajit Pd v. Nandini, A* [1975] Or 184). If the *prima facie* case is not rebutted by cogent evidence and remains unanswered or the answer given does not create serious doubt in H the mind of the court, then the burden of proof on the pleadings should be deemed to have been discharged (*Mg Hmoot v. Offl Receiver*, 14 R 704: A [1937] R 276; see also *Bhola v. Bhagwat*, 13 CPLR 159; *Gangadin v. Bahoram, A* [1937] N 230). The true test of onus in the case of 'shifting' has been thus put by Lord Hanworth MR:

I

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on the one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. *What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence.* (*Stoney v. Eastbourne R D Council* [1927] 1 Ch 367, 397).
>
> (emphasis added)

Application Of Law To Facts

[50] The burden of proof therefore lies on Bond to prove issue 1. Enclosure 95 notes of proceedings pp. 572 and 575 which is the cross-examination of DW5 do not support Bond's contention that the parties by agreement and/or conduct agreed not to strictly adhere to the terms of the collaboration agreement.

[51] Sycal's Company Secretary and Financial Controller, DW4 did admit (see encl. 95 notes of proceedings at p. 401) that there was no strict adherence to the timeline provided in the agreement based on the letters from Sycal to Bond dated 27 January 2022 and 9 March 2022. The two letters can be seen in encl. 60 bundle B23 pp. 27 and 28.

[52] However, Sycal's letter dated 27 January 2022 in fact shows Sycal reminded Bond that Bond had failed to pay the fourth tranche payment, the fifth tranche payment is deferred to 23 April 2022, the sixth tranche payment is deferred to 24 June 2022 and the final payment is deferred to 22 October 2022.

[53] The letter dated 9 March 2022 also shows Sycal reminded Bond to pay in accordance with the new deadlines.

[54] In conclusion, I hold that although Sycal did gave some extensions to the payment deadlines Bond is still under an obligation to comply with the new deadlines stipulated by Sycal. Thus, Bond has failed to prove that the parties by agreement and/or conduct agreed not to strictly adhere to the terms of the collaboration agreement.

Agreed Issue 2 – Whether There Is A Breach Of The Collaboration Agreement By Bond?

[55] Sycal's letter dated 27 January 2022 to Bond shows Sycal reminded Bond that Bond had failed to pay the fourth tranche payment, the fifth tranche payment is deferred to 23 April 2022, the sixth tranche payment is deferred to 24 June 2022 and the final payment is deferred to 22 October 2022. (See encl. 60 bundle B23 p. 27).

[56] Sycal's letter dated 9 March 2022 to Bond also shows Sycal reminded Bond to pay in accordance with the new deadlines. (See encl. 60 bundle B23 p. 28).

[57] Bond has failed to adduce any evidence to show it had complied with the new payment deadlines stipulated by Sycal. Nowhere in Bond's written submissions can I see any assertion and proof to show Bond had raised the full agreed RM20 million in advance funding in accordance with the new deadlines.

[58] In fact, Bond in its written submissions at para. 70 admitted that "Sycal received a sum of RM18,816,000 out of the RM20,000,000 that Bond was to raise for Sycal under the agreement. As such, Bond fulfil 94.08% of its obligation under the agreement."

[59] In conclusion, I hold that Bond has breached its obligation to raise RM20 million in advance funding under the collaboration agreement.

Agreed Issue 3 – Was The Termination Of The Collaboration Agreement By Sycal Valid?

[60] Based on my answer to issues 1 and 2, I hold the termination of the collaboration agreement by Sycal is valid.

Agreed Issue 4 – Is Bond Entitled To Damages Of RM8,645,048.71, Or In The Alternative, A Sum To Be Assessed By The Honourable Court?

Can Bond Claim Under Quantum Meruit, s. 71 Of The Contracts Act 1950 And/Or Unjust Enrichment?

The Law On Success Fee Contract Cases

[61] I would begin by stating that the facts of our case are different from the "success fee contract" cases whereby the courts have held that where parties had agreed on the payment of a success fee when the term of payment is met, if the said term is not met the courts will not allow an alternative claim under *quantum meruit* and/or unjust enrichment.

(See the UK Supreme Court's decision in *Barton v. Morris And Another (In Place Of Gywn Jones, Decd)* [2023] AC 684, the English Court of Appeal's decision in *Contra Holdings Ltd v. Bamford* [2023] EWCA Civ 374 and *KS Lee Energy LLP v. Toyo Ink Group Bhd* [2023] CLJU 1978; [2023] 1 LNS 1978; [2023] MLRHU 2227).

[62] In our case the entitlement of Bond under the collaboration agreement is not directly linked to Bond successfully raising the RM20 million advance. In short, the contract does not say Bond is entitled to be paid only if it had successfully raised the RM20 million advance.

[63] I next consider whether Bond can claim under *quantum meruit* and s. 71 of the Contracts Act 1950. Thereafter, I will consider whether Bond can claim under unjust enrichment.

The Law On *Quantum Meruit* And s. 71 Of The Contracts Act 1950

[64] Section 71 of the Contracts Act 1950 provides as follows:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[65] Section 71 of the Contracts Act 1950 is the statutory embodiment of the common law principle of *quantum meruit*. (See *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002; [2015] MLRAU 468).

[66] Four conditions must be satisfied to establish a claim under s. 71. The doing of the act or the delivery of the thing referred to in the section:

(i) must be lawful;

(ii) must be done for another person;

(iii) must not be intended to be done gratuitously; and

(iv) must be such that the other person enjoys the benefit of the act or the delivery.

(See the Privy Council's decision in *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] CLJU 161; [1967] 1 LNS 161; [1967] 1 MLRA 53; [1967] 2 MLJ 118 which was followed in *Usima Sdn Bhd v. Lee Hor Fong* [2017] 9 CLJ 646; [2017] 5 MLRA 552; [2017] 5 MLJ 273; [2017] 6 AMR 652 and *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd & Anor* [2020] CLJU 442; [2020] 1 LNS 442; [2020] MLRHU 406 per Lee Swee Seng J).

Are Quantum Meruit, Unjust Enrichment And Restitution Pleaded In The Statement Of Claim?

Must A Claim In *Quantum Meruit* Be Pleaded?

[67] A claim in *quantum meruit* must be pleaded in the statement of claim. (See *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2016] 10 CLJ 112; [2014] 2 MLJ 322).

[68] This is what Mohamad Ariff JCA said in *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2016] 10 CLJ 112; [2014] 2 MLJ 322:

> [1] This was an appeal by the defendant from the decision of the High Court after a full trial whereby *the learned judicial commissioner dismissed the plaintiffs claim for special and general damages, but nonetheless ordered that damages be assessed by the registrar on a quantum meruit basis in what appeared to be an exercise of the court's discretion 'to do justice to the party that deserves it though the pleadings may be less than elegantly worded.' …*

A …

[6] We found *the learned judicial commissioner had decided based on an unpleaded claim …*

[7] *The High Court had decided to order an assessment of damages by the registrar based on an 'omnibus' prayer in the statement of claim, ie the claim for further and other relief,* reflected in para 18(g) of the statement of claim, reading: 'Lain-lain perintah yang difikirkan wajar, sesuai dan manfaat oleh Mahkamah Yang Mulia ini.' *This, in our judgment, was an error in the circumstances of this case.*

[8] The learned judicial commissioner also held that compensation could also be payable under s 71 of the Contracts Act 1950, if the basis of quantum merit and implied terms was not available. As for incorporating implied terms, we also agreed with the appellant's submission that this too was not pleaded.

[9] The judicial commissioner, in the exercise of his discretion, had therefore misapplied fundamental rules of pleadings. The issue of *quantum meruit* was raised only after the full hearing of the witnesses ended, coming up only at the close of the trial when the learned judicial commissioner requested parties to raise it during submission.

[10] Thus, no evidence on the claim of *quantum meruit* was led, nor any evidence on the intention of the parties to support the inference of the implied term for reimbursement; the evidence led related to the respondent's claims for special and general damages, which were in fact dismissed by the learned judge …

…

[22] To decide on an unpleaded claim is to deny the opposing party the valuable right to answer the claim by adducing such material facts at the trial as it might find necessary to forward to the court to advance its case against the claim. On the facts of this appeal, however, the problem was compounded by the absence of supporting material facts in relation to a *quantum meruit* claim. This claim was never expressly pleaded and was never part of the agreed facts or agreed issues. It never figured even in the summary of the plaintiff's case, the plaintiff's case was wholly grounded on a claim for special and general damages for breach of the cooperation agreement.

…

[27] In our view, a claim for *quantum meruit* here related to more than a claim based on the legal effects of pleaded material facts; it was a cause of action in itself, which was substantive in nature and therefore required express pleading and the adduction at trial of a sufficient foundation of facts derived from evidence tendered through witnesses' testimony or relevant, cogent documentary evidence. It was too substantive to be subsumed under the blanket notion of it being based on material facts 'writ large in the whole

claim.' By the same token, it was difficult to blandly accept that the 'omnibus' prayer of 'further or other relief' could supply the omission of an express pleading. Resort to the omnibus prayer would only make sense where the main claim was not dismissed, since after all this was for 'further or other relief'. In our opinion, the decision of the Federal Court in *Lim Eng Kay v. Jaafar bin Mohamed Said*, cannot be so liberally read as to countenance a major breach or misapplication of fundamental rules of pleadings and the proper role of the court in our adversarial system of civil justice.

[28] There was likewise no basis for s 71 to be applied, especially in the face of clear contractual provisions which made the appointment of the respondent as process designer dependent on further agreement during the post-award stage. Section 71 cannot be interpreted as providing a relief not intended by the parties. To quote this provision for the sake of completeness:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
>
> (emphasis added)

Did Bond Plead Quantum Meruit In The Statement Of Claim?

[69] Sycal contends in its reply written submissions at para. 5.6 that *quantum meruit* was not pleaded in the statement of claim.

[70] Although the words '*quantum meruit*' were not expressly used in the statement of claim, I find that at para. 66 the four elements, namely, 'the advance funding was a lawful act, 'the advance funding was done for Sycal', 'the advance funding was not intended to be done gratuitously' and 'Sycal enjoyed the benefit of the advance funding' were pleaded. (See statement of claim at paras. 66(a) to (d)).

[71] Therefore, I hold that a cause of action based on *quantum meruit* and s. 71 of the Contracts Act 1950 which is the statutory embodiment of the common law principle of *quantum meruit* has been sufficiently pleaded by Bond.

Did Bond Plead Unjust Enrichment In The Statement Of Claim?

[72] Restitution is also pleaded in the statement of claim at paras. 64 and 65. We now use the term unjust enrichment for a claim based on restitution. (See *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 per Azahar Mohamed FCJ at [1]).

[73] A perusal of the pleading shows that the words 'unjust enrichment' were also pleaded. (See statement of claim at paras. 64(c) and (f)).

A *Can Bond Claim Under Quantum Meruit And s. 71 Of The Contracts Act 1950?*

[74] A more fundamental objection to Bond claiming under *quantum meruit* and its codification under s. 71 of the Contracts Act 1950 is that there cannot be a claim for *quantum meruit* if there is an existing contract between the parties to pay an agreed sum. This is because a claim under *quantum meruit* is based on *quasi*-contract.

(See *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 MLJ 546, *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd & Anor* [2020] CLJU 442; [2020] 1 LNS 442; [2020] MLRHU 406, *Lumbers & Anor v. W Cook Builders Pty Ltd (In Liq)* 247 ALR 412; [2008] HCA 27 High Court of Australia and *Barton V Morris And Another (In Place Of Gwyn Jones, Decd)* [2023] AC 684 UK Supreme Court).

[75] In *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 MLJ 546, Abdul Malik Ishak JCA in his judgment set out a useful review of the law on *quantum meruit* which bears reproduction *in extenso*:

> [39] According to the case of *Gilbert & Partners (a firm) v. Knight* [1968] 2 All ER 248 (CA), *a claim on a quantum meruit cannot arise if there is an existing contract between the parties to pay an agreed sum.* The facts in *Gilbert & Partners (a firm) v. Knight* may briefly be stated as follows. There, a surveyor agreed to prepare drawings, arrange tenders and supervise works pertaining to alteration, the cost of which he estimated at roughly £600, for a fee of £30. The employer ordered extra work which brought the total cost to £2,283 but the surveyor did not, while the work was going on, tell the employer that he would require further fees. The court held that the surveyor would be bound by the existing agreement to perform services for £30 and could not recover a reasonable sum on a new implied contract.
>
> [40] However, *there may be a quantum meruit claim in the following situations:*
>
> (a) when there is *an express agreement to pay a reasonable sum;*
>
> (b) *when no price is fixed* (thus, if the contractor does work under a contract express or implied and no price is fixed by the contract, the contractor is entitled to be paid a reasonable sum for his labour and the materials supplied (*Moffatt v. Andrew Laurie & Anor* (1855) ER 139; 15 CB 583; *Turriff Construction Ltd and Turriff Ltd v. Regalia Knitting Mills Ltd* (1972) 9 BLR 20; 222 EG 169; [1972] EGD 257; and *Holland Hannen & Cubitts (Northern) Ltd v. Welsh Health Technical Services Organisation & Ors* (1981) 18 BLR 80);
>
> (c) *in a quasi-contract situation* (a classic example would be when work is carried out while negotiations as to the terms of the contract are proceeding but agreement is not reached upon essential terms, the contractor is entitled to be paid a reasonable sum for the work carried out (*Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd, Trading as Nuclear Civil Constructors (a firm) v. Atomic Power Constructions*

Ltd [1963] 1 WLR 333; and *Peter Lind & Co Ltd v. Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234);

(d) *when work is performed outside a contract* (thus, in a situation where there is a contract for specified work but the contractor does work outside the contract at the employer's request the contractor is entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract (*Alexander Thorn v. The Mayor and Commonalty of London* (1875-1876) LR 1 App Cas 120 at p 127 (HL); *Parkinson (Sir Lindsay) & Co Ltd v Commissioners of Works* [1949] 2 KB 632 (CA); *Greenmast Shipping Co SA v. Jean Lion Et Cie SA (The 'Saronikos')* [1986] 2 Lloyd's Rep 277; and *Cana Construction Co v. R* [1974] SCR 1159; 37 DLR (3d) 418, Supreme Court of Canada); and

(e) *when work is done under a void contract* (this envisages the situation where a contractor carries out work or renders services under a contract subsequently found to be void, the contractor is entitled to a *quantum meruit* for the work or services (*Craven-Ellis v. Canons Ltd* [1936] 2 KB 403 (CA); and *Rover International Ltd & Ors v. Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA)).

…

[43] The term '*quantum meruit*' is a Latin term. In Latin, it means 'how much he desires. It is a common terminology in an action of general assumpsit to recover payment for the value of labour and services.

(emphasis added)

[76] In *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd & Anor* [2020] CLJU 442; [2020] 1 LNS 442; [2020] MLRHU 406 Lee Swee Seng J when rejecting a claim based on *quantum meruit* said:

[103] In *Lumbers & anor v. W Cook Builders Pty Ltd (In Liq)* 247 ALR 412; [2008] HCA 27, the High Court of Australia dismissed a claim for *quantum meruit* where there is a clear contractual relationship between the parties.

[77] Another case stating the same principle is *Barton v. Morris And Another (In Place Of Gwyn Jones, Decd)* [2023] AC 684 where the UK Supreme Court by a 3-2 majority said:

100 As to the *quantum meruit* claim, McCardie J said:

> This point calls for attention, inasmuch as it raises a question of interest and importance to all agents who rely on the payment of commission as their means of income. *I must point out that the commission note before me represented the result of discussion between the plaintiffs and the defendants. It embodied their bargain. They reduced their agreement to writing.* There was no collateral arrangement whatsoever. *The rights of the plaintiffs are to be found in the commission note alone, and so the parties intended.* If this be so, then it follows … that the rule '*Expressum facit cessare tacitum*' here applies. *There is no scope on the present facts for the operation of the quantum meruit principle.* (pp 114-115.)

A 101 McCardie J cited a number of Court of Appeal authorities supporting his analysis that a plaintiff cannot claim on a *quantum meruit* where they have chosen to tie themselves down by the express terms of an agreement. There, as in the present case, the contract covers the ground so far as concerns when Mr Barton is entitled to receive a commission for the introduction of the purchaser and there is no room for an unjust
B enrichment claim.

102 Carr LJ arrived at a similar conclusion nearly a century later at para 133 of *Dargamo*:

> However, where the basis of the consideration is expressly and unconditionally spelt out on the face of a valid and subsisting
C contract, as here, there is no proper scope for inquiring into an alternative basis that is plainly contrary to the express basis freely agreed between the parties. … (emphasis added)

[78] I now move on to consider Bond's claim based on unjust enrichment.

D The Claim In Restitution Now Known As Unjust Enrichment

[79] At the outset, it is important that I stress that, unlike a claim for *quantum meruit*, there can be a claim based on unjust enrichment even when there exist a contract between the parties.

E **[80]** Further, the law of unjust enrichment is not concerned with the issue that a contract breaker should not benefit from his wrong. The fact that a claimant is in breach of contract does not bar a claim for unjust enrichment if the claimant satisfies the four requirements for a claim based on unjust enrichment. (See *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 at paras. 106, 129 and 131).

F **[81]** Bond relies on the decision in *Pavey & Matthews Pty Ltd v. Paul* [1987] 69 ALR 577 where the Australian High Court relied on the principles of restitution to allow a payment claim for building work done under an oral contract, which was not enforceable under the Builders Licensing Act 1971 due to it not being in writing.

G **[82]** The Australian High Court stressed a claim based on restitution arises from the respondent's acceptance of the benefits accruing to the respondent from the appellant's performance of the unenforceable oral contract, that the benefits were not intended as a gift and that fair and just compensation for
H the benefit or enrichment accepted will correspond to the fair value of the benefit provided. (See Held 1(b) and (h)).

[83] Since the Australian High Court's decision of *Pavey & Matthews Pty Ltd v. Paul* [1987] 69 ALR 577, the doctrine of unjust enrichment has evolved. Earlier cases that have lumped analysis on *quantum meruit*, restitution and
I unjust enrichment together do not represent the current jurisprudence.

[84] The leading case in Malaysia on unjust enrichment is the 2015 Federal Court decision in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 where the material facts are roughly similar to the case before me.

[85] The facts are as follows. By a sale and purchase agreement ('the SPA'), the defendant agreed to purchase a land from the plaintiff with the plan of developing it into a commercial complex. The defendant failed to pay the balance purchase price. The plaintiff thus brought an action in the High Court against the defendant to recover vacant possession of the land.

[86] At the time of filing the writ, the defendant had already begun construction works on the land to build a mall. Construction proceeded notwithstanding the court action. By the time the trial before the High Court was concluded, a fully functioning completed mall with ongoing businesses was on the land. Two of the questions before the Federal Court were:

(i) whether as a matter of law, if the defendant was in breach of contract for the purchase of the land, whether it precluded the defendant from being awarded restitution pursuant to the doctrine of unjust enrichment in respect of the defendant's improvement and enhancement of the land; and

(ii) whether the measure of restitution calculated was merely restricted to the costs of construction of a building, without reference to the enhancement of the market value of the said land.

[87] Azahar Mohamed FCJ in an instructive judgment of the Federal Court answered both questions as follows:

> Answers To The Relief Questions
>
> [159] In consequence, our answers to the relief questions are as follows:
>
> Answer to question 1: The defendant is not precluded from being awarded restitution pursuant to the law of unjust enrichment in respect of the defendant's improvement and enhancement of the land at the defendant's own costs, effort and experience.
>
> Answer to question 2: The measure of for unjust enrichment is the market value of the mall and it is not restricted to the costs of construction of the building.

[88] The following principles can be distilled from *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453:

(i) the law of unjust enrichment is originally called the law of restitution. See grounds of judgment at [1];

(ii) section 71 of the Contract Act 1950 and *quantum meruit* are different from the law of unjust enrichment as we understand it today. See grounds of judgment at [101];

A (iii) there can be a claim based on unjust enrichment even when there exist a contract between parties;

(iv) the law of unjust enrichment is not concerned with the issue that a contract breaker should not benefit from his wrong. The fact that the claimant is in breach of contract does not bar a claim for unjust
B enrichment if the claimant satisfies the four requirements for a claim based on unjust enrichment. See grounds of judgment at [106, 129 and 131];

(v) remedies for contractual disputes are generally compensatory in nature, with damages assessed based on the loss suffered by the claimant.
C Restitutionary remedies, on the other hand, focus on any unjust enrichment to a party at the claimant's expense. It is aimed at restoring that enrichment to the claimant. It is clear on principle and on authority that the idea of justice behind this aim is that no one should be made richer through loss to another. See grounds of judgment at [10];

D (vi) the claimant has made out a cause of action in unjust enrichment if he can show:

(a) the respondent has been enriched;

(b) that this enrichment was gained at the claimant's expense;
E

(c) that the respondent's enrichment at the claimant's expense was unjust, and

(d) there are no defences to extinguish or reduce the respondent's liability to make restitution to the claim.
F

(See grounds of judgment at 117 and 119).

[89] In arriving at his decision, Azahar Mohamed FCJ gave the following instructive analysis which bears setting out *in extenso*:

G [117] The above passages from the judgments of the House of Lords are instructive and are a significant contribution to the development of the law of unjust enrichment. The principle underlying the cases … is that, …, *a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that: (a) The plaintiff must have been enriched; (b) The enrichment must be gained at the defendant's expense; (c) That the retention of the*
H *benefit by the plaintiff was unjust; and (d) There must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.*

[118] … there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts…

[119] Applying those principles, *we now turn to consider whether the defendant*
I *has made out a cause of action in unjust enrichment: the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, that the plaintiff's enrichment at the defendant's expense was unjust, and whether there are any special defences to the claim.*

Was The Plaintiff Enriched?

…

[123] The plaintiff has unquestionably benefited even though it did not request for the mall to be constructed. But the mall was not constructed and maintained by the defendant to benefit the plaintiff gratuitously. ... The plaintiff would receive a massively enhanced asset and this adds to its enrichment. The mall is an indisputable benefit to the plaintiff. Therefore, we conclude that the first requirement is satisfied.

Was The Enrichment At The Expense Of The Defendant?

…

[126] The defendant had embarked upon the promotion of the mall and was responsible for the overall running, upkeep and maintenance of the building, road and infrastructure as well as the general administration of the mall. The defendant had expended time, effort, expertise and all at its own costs in establishing and maintaining the business venture known as the mall to the stature and success it had reached to date. …

[127] In our judgment, the enrichment or benefit of the plaintiff was undoubtedly at the expense of the defendant.

Was The Enrichment Unjust?

[128] The most important question which we must now asked is whether it is unjust for the plaintiff to retain to the benefit (the unjust question). The English approach to the unjust question is to ascertain an unjust factor such as, for example, mistake or failure of consideration. This differs with *the civilian approach to the unjust question which consider whether there is a lack of juristic basis* …

[129] *We would adopt "the absence of basis"* (to borrow the term used by Goff & Jones: *The Law of Unjust Enrichment* (*supra*) para. 1-19) *approach of the civilian and mixed law systems for the reason that, in our view, it would produce a fairer outcome. Applying this approach, the plaintiff can escape restitutionary liability by showing that there was a legal ground for receiving an enormously enhanced and improved asset in the form of the business of a shopping mall.* The important point to note here is that the defendant was not required to benefit the plaintiff by legislations or by contract. *In our judgment the reason why there is liability in these circumstances is that the plaintiff's enrichment is unjustified and that there is no legal ground for the plaintiff to claim and enjoy the full commercial value of the mall. Therefore, the defendant has a prima facie right to restitution.*

[130] On the factual matrix of the present case, in our judgment, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the plaintiff is at the same time made richer by the defendant's loss by the same amount. On that note, the point to make here is this. This sense of injustice at the defendant's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. The plaintiff should not be allowed to reap the windfall at

A the expense of the defendant. The defendant lawfully constructed the mall on the land not intending to do so gratuitously with the plaintiff enjoying its benefit. On this basis, it warrants judicial intervention as a legal response triggered by an unjust enrichment in the fact situation of the present case.

B [131] *To conclude, we hold that the defendant had made out a cause of action in unjust enrichment in that the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, and that the plaintiff's enrichment was unjust.* (emphasis added)

[90] The principles set out in *Dream Property* are also the current legal C position in England. In the recent 2023 UK Supreme Court decision in *Barton v. Morris And Another (In Place Of Gywn Jones, Decd)* [2023] AC 684 on a success fee agreement, this is what Lady Rose (with whom Lord Briggs and Lord Stephens agree) said:

3. The claim in unjust enrichment

D (a) Failure of basis: the principles

77. The evolution of the claim in unjust enrichment was described in the recent comprehensive and scholarly judgment of Carr LJ in *Dargamo Holdings Ltd v. Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244 … see paras 51 onwards. As E she states there, there are four factors that a court needs to consider in a claim for unjust enrichment, … *When faced with a claim for unjust enrichment, a court must first ask itself four questions: (1) has the defendant been enriched? (2) was the enrichment at the claimant's expense? (3) was the enrichment unjust? (4) are there any defences available to the defendant?* In the present appeal, it is accepted by Foxpace that the F answer to the first two questions is 'yes' and that the answer to the fourth question is 'no'. The issue between the parties is therefore whether Foxpace's enrichment arising from the introduction by Mr Barton of Western as the purchaser of Nash House was unjust unless they pay Mr Barton a reasonable fee.

G 78. The unjust factor on which Mr Barton relies is 'failure of basis' - the terminology which is generally preferred to 'failure of consideration' for the reasons explained by Carr LJ in *Dargamo* at paras 77 onwards. She said at para 79:

> The core concept of 'failure of basis' is that a benefit has been H conferred on a joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit (see *Goff & Jones* [sc 7th edn, 2007] at 12-01). Whilst failure of basis ranks alongside the unjust factors of mistake, duress and undue influence as a factor negativing consent, it differs in that it is concerned with I qualification of consent, as opposed to impaired or vitiated consent (see *Burrows The Law of Restitution* (3rd edn, 2011)). (emphasis added)

Application Of Law To Facts

How Much Advance Funding Was In Fact Raised And Provided By Bond?

[91] Before I address the issue whether Bond has satisfied the four criteria for a successful claim based on unjust enrichment, it is necessary to answer the issue how much advance funding was actually raised and provided by Bond to Sycal.

[92] Bond contends it has provided advance funding of RM19,525,048.71 (see encl. 33 bundle A p. 32 statement of claim at para. 59). Sycal admitted only receiving a sum of RM18,816,000. (See encl. 33 bundle A p. 56 defence at para. 33).

[93] Bond in its written submissions has now used Sycal's admitted figure of RM18,816,000 to now assert it has fulfilled 94.08% of its obligation to raise RM 20 million under the agreement. (See Bond's written submissions encl. 98 at para. 70).

[94] In view of the admission by Sycal in para. 33 of its defence that it has received a sum of RM18,816,000 from Bond and Bond's reliance on this admission in its written submissions, I therefore hold that Bond has raised a sum of RM18,816,000.

[95] RM18,816,000 out of RM 20 million is 94.08%. I therefore further hold that Bond has fulfilled 94.08% of its obligation to raise RM20 million under the collaboration agreement.

[96] I now address the issue whether Bond has satisfied the four criteria for a successful claim based on unjust enrichment.

First Criteria – Has Sycal Been Enriched?

[97] Sycal has obtained from Bond advance funding of RM18,816,000 out of the RM20,000,000 that Bond agreed to raise under the collaboration agreement. Sycal admitted receiving this sum of RM18,816,000 in its defence. (See encl. 33 bundle A p. 56 defence at para. 33).

[98] RM18,816,000 out of RM20 million is 94.08%. As such, Bond has fulfilled 94.08% of its obligation under the agreement. Sycal has enjoyed the benefit of this RM18,816,000 to use for its construction of the remaining 20% of the commercial suites.

[99] Further, from the sales of the 74 units of commercial suites since the collaboration agreement, Sycal has continued to receive its Sycal's entitlement under the formula set out in cl. 2.7 of the collaboration agreement. I had earlier set out the details on the division of Sycal's entitlement and Bond's entitlement from the sale proceeds in the background facts above.

[100] I hold Sycal has indeed been enriched by Bond.

A Second Criteria – Was The Enrichment At Bond's Expense?

[101] The answer is yes as Bond used its own funds and moneys to carry out the marketing and sales of the remaining 185 commercial units that were unsold. (See cls. 2.6 and 6.1(a) of the collaboration agreement).

B **[102]** PW2 Hew Lee Kuen has testified that Bond managed to sell 74 units of the remaining 185 commercial units that were not sold. (See encl. 69 plaintiff's witness statement of Hew Lee Kuen Q and A3).

[103] Further, Bond has fulfilled 94.08% of its obligation under the collaboration agreement by raising RM18,816,000 out of the agreed RM20 C million for Sycal to use for its construction of the remaining 20% of the commercial suites.

[104] I hold the enrichment was at Bond's expense.

[105] Before I proceed to consider the third criteria for a claim for unjust D enrichment which is 'was the enrichment unjust?' it is necessary for me to consider two other issues:

(i) how much is Bond entitled to receive if it has raised RM20 million?

(ii) how much is Bond entitled to receive as Bond only raised 94.08% of the RM20 million? E

How Much Is Bond Entitled To Receive If It Has Raised RM20 Million?

[106] Bond's witness Hew Lee Kuen the CFO of bond, PW2 has testified (encl. 69 Q and A3 para. 4) that under the collaboration agreement's 'perfect scenario projection' Bond is supposed to received RM10,066,845.46 if it had F raised 20 million. For the perfect scenario projection see encl. 65 bundle B27 at p. 183 bottom right.

[107] Bond, in its post-trial written submissions, has now conceded and now said Bond's entitlement under the collaboration agreement is RM9,946,389.46 if it had raised the agreed RM20 million. (See encl. 98 Bond's written G submissions at paras. 7 and 71).

[108] In view of the concession by Bond to a lower sum, unless rebutted by Sycal by cogent evidence, I accept that Bond's entitlement under the collaboration agreement is RM9,946,389.46 if it had raised 20 million. (See encl. 98 Bond's written submissions at para. 71). H

[109] Therefore, based on the testimony of Bond's witness, Hew Lee Kuen the CFO of Bond, PW2 and the evidence referred to by her (*ie*, the perfect scenario projection in encl. 65 bundle B27 p. 183 bottom right), I hold that Bond has discharged the legal burden imposed on Bond under s. 101 of the I Evidence Act.

[110] In accordance with s. 102 of the Evidence Act, the evidential burden also known as onus of proof has now shifted to Sycal to rebut Bond's contention that Bond's entitlement under the collaboration agreement is RM9,946,389.46 if it had raised the agreed RM20 million.

(See *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357 at 367 per Gopal Sri Ram JCA and *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580 per Zulkefli Ahmad Makinudin PCA at [36]).

[111] Sycal in its reply written submissions has not offered any figure save for a bare denial. (See encl. 103 defendants' reply submissions at para. 62).

[112] Therefore, I hold that Sycal has failed to rebut Bond's contention that Bond's entitlement under the collaboration agreement is RM9,946,389.46 if it had raised the agreed RM20 million.

How Much Is Bond Entitled To Receive As Bond Only Raised 94.08% Of RM20 Million?

[113] Bond contends Bond is entitled to 94.08% of RM9,946,389.46 namely RM 9,357,563.20. This sum must however deduct the sum Bond has already received. Bond has produced two different figures.

[114] Hew Lee Kuen the CFO of Bond, PW2 testified that Bond has received RM6,430,000. (See encl. 69 Q and A4).

[115] However, subsequently in Bond's written submissions encl. 98 at para. 71, Bond now admits Bond has received RM6,773,738.99 based on the table in encl. 88 bundle B31 p. 12. I will accept this concession from Bond's counsel that Bond has received RM6,773,738.99.

[116] Therefore, I hold that Bond has discharged the legal burden imposed on Bond under s. 101 of the Evidence Act.

[117] In accordance with s. 102 of the Evidence Act, the evidential burden also known as onus of proof has now shifted to Sycal to rebut Bond's contention that Bond has only received RM6,773,738.99 by showing Bond had received more than RM6,773,738.99.

(See *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357 at 367 per Gopal Sri Ram JCA and *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580 per Zulkefli Ahmad Makinudin PCA at [36]).

[118] However, Sycal in its written submissions never seriously challenged these figures put forward by Bond. All that Sycal did was to make bare denials (See encl. 103 Sycal's reply written submissions at para. 62).

[119] In the premises, I hold that Sycal has failed to rebut Bond's contention. I therefore hold that Bond has received RM6,773,738.99.

[120] Therefore RM9,357,563.20 (Bond's entitlement based on 94.08% of RM20 million) less RM6,773,738.99 (that had earlier been received by Bond) would leave a sum of RM2,583,824.21 that Sycal has yet to receive from Bond.

Third Criteria – Was The Enrichment Unjust?

[121] In my view, it would be unjust for Sycal to keep this RM2,583,824.21 since it was earned by Bond from its fulfilment of 94.08% of its obligation to raise RM20 million under the collaboration agreement.

[122] It is also unjust as under cl. 6.1(e) of the collaboration agreement all the expenses and costs incurred for the marketing and sales purposes for the commercial suites including promotion, advertising, hiring of agents and third parties are borne by Bond. (See encl. 50 bundle B15 p. 3551).

[123] Of the remaining 185 commercial suites that were unsold, Bond's efforts led to the subsequent sales of 74 units of the commercial suites prior to the termination. (See encl. 69 PW2 Hew Lee Kuen witness statement Q and A3).

Fourth Criteria – Are There Any Defences Available To Sycal?

[124] The facts do not show any defences to extinguish or reduce Sycal's liability to make restitution to the claim.

[125] On agreed issue 4 therefore, I am satisfied Bond has made out a cause of action in unjust enrichment in that Sycal has been enriched, that this enrichment was gained at Bond's expense, that Sycal's enrichment was unjust and there are no defences to extinguish or reduce Sycal's liability to make restitution to the claim.

[126] In conclusion, I hold that Sycal is liable to pay to Bond RM2,583,824.21 under the principle of unjust enrichment.

[127] I now consider agreed issue 5.

Agreed Issue 5 – Whether Sycal Is Entitled To The Reliefs Sought In The Counterclaim?

[128] I have earlier set out above all the reliefs sought by Sycal in its counterclaim under the heading 'The Pleaded Defence and Counterclaim of Sycal'.

[129] Based on my answers to agreed issues 1 to 3, I hold that Sycal is entitled to its counterclaim in para. 78 prayers (a) to (c).

[130] Sycal is not entitled to the prayers in para. 78(d), (e), (g) to (j) and (l). This is because no evidence has been led on the quantum of general damages suffered and no submissions have been made to me to justify a claim for aggravated and exemplary damages.

[131] Sycal has not led any evidence to show that the failure of Bond to raise the balance RM1,184,000 of the agreed RM20 million had prevented Bond from selling more than the 74 units of the commercial suites that Bond had sold, and therefore reduced the sales proceeds that Sycal would have received under cl. 2.7 of the collaboration agreement. Sycal has failed to prove Bond could have sold more than the 74 units of the commercial suites that were sold by Bond prior to the termination.

[132] Sycal has earlier dropped para. 78 prayer (f).

[133] I thank the counsel for the parties for their submissions which had greatly assisted me.

Decision

[134] For the reasons above, in respect of the plaintiff's suit:

(i) the prayers in para. 68(a) to (e) are dismissed.

(ii) for prayer in para. 68(f), (i) and (j) I hold that the defendants are liable to pay to the plaintiff RM2,583,824.21 with interest at 5% per annum from the date of judgment till full payment.

(iii) the prayers in para. 68(g) to (h) are dismissed.

[135] The defendants are entitled to their counterclaim in para. 78 prayers (a) to (c). Paragraph 78 prayers (d) to (l) are dismissed.

[136] Each party to bear own costs since the plaintiff and the defendants have won and lost some prayers each.